REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 6 of 2008

KHAEMBA PATRICK WANYONYI.....PLAINTIFF

~VRS~

TEACHERS SERVICE COMMISSION.....DEFENDANT

RULING

The question of jurisdiction

[1] The court asked the parties on 14/1/2013 to address *in limine* the question of jurisdiction of the court to preside over this matter which relates to disputes on employment and labour relations. I am guided by the famous decision of the Court of Appeal in **OWNERS OF MOTOR VESSEL 'LILLIAN S' v CALTEX OIL (K) LTD [1989] KLR 1** that;

…a question of jurisdiction ought to be raised at earliest opportunity and the court…to decide the issue right away on the material before it".

Defendant's view

[2] Mr. Sitima, learned counsel for the Defendant addressed the court first. He was of the view that the court does not have jurisdiction over this matter both in fact and in law. According to him, the Plaintiff was and still is the employee of the Defendant. Only that, in April, 2011 he was subjected to a disciplinary process but whose results were quashed by the Judge in judicial review applied for by the Plaintiff. Upon the decision of the High Court, TSC:

a) Reinstated the Plaintiff to employment.
b) Paid all his salary arrears.

[3] There was and still subsists employer-employee relationship between the Plaintiff and the Defendant, Mr. Sitima urges. On this basis, the Plaintiff should go to the Industrial Court. The High Court is the wrong forum. Nothing in law would prevent the Industrial Court from considering and determining the fundamental issues that have emerged in this proceeding. If the Plaintiff needed any interpretation of the law, he should have filed for that interpretation first.

The plaintiff's view

[4]The Plaintiff, an eloquent and coherent person, submitted in person on this issue. He argued that this case is premised on facts which took place in 1999, particularly, the ruling of the court made on 1/2/2006. In the premises, this court has jurisdiction to preside over this case.

[4]His reasons for the view he has taken are:

(a)The suit was filed before the current Industrial Court was contemplated. The Industrial Court Act came into operation on 30/8/2012. According to him, section 33 of the Industrial Court Act relates to proceedings pending before the Industrial Court, the predecessor of the current Industrial Court, whereas section 22 of the Sixth Schedule of the Constitution confers jurisdiction on this court to hear all proceedings pending before it. The CJ or the registrar has not directed that these proceedings be moved to another venue.

(b)That this court has original jurisdiction under Article 165 (3) (a) of the Constitution to hear this matter. He argued that not all employment and industrial relations cases were transferred to the Industrial Court. He referred the court to section 7 of the Sixth Schedule of the Constitution.

[6]The Plaintiff relied on the several cases to wit **Kipkursi Lagat v. Police Commissioner & Another [2012] e KLR, Brookside Dairy Ltd v AG & another [2012] e KLR, R v A-G & Others MSA Misc. Appl. No.3 of 2012, Chars Karisa Thoya v R [2011] e KLR, Orengo v Moi [2008] 1 KLR (ep),** and **Rodgers Ondieki Nyakundi v R [2012] e KLR.**

COURT RENDERS ITSELF THUS.

Constitution be read as a whole

[7] From the submissions by the Plaintiff, it is evident he is reading the provisions of the Constitution selectively, and in isolation from other relevant and related provisions. In particular Article 165, and section 22 of the Sixth Schedule of the Constitution. He has reproduced section 22 of the Sixth Schedule and underlined those parts he feels aid his case as below:

"***All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar."***

[8]That section should be read in the context of the entire Constitution. In this case, Article 165 (5) and 162 (2) will come into play. The Industrial Court Act should also be interpreted in light of the provisions of Article 259, 162 (2) and 165 (5) of the Constitution. Section 22 of the Sixth Schedule of the Constitution, and section 33 of the Industrial Act are transitional clause which are aimed at ensuring that there is no lapse in the adjudication of cases before substantive legislative measures and institutional structures are put in place by Parliament as mandated by the Constitution.

Limitation of unlimited jurisdiction of High Court

[9] Article 162 (2) (a) of the Constitution empowered Parliament to enact legislation to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. Once the court under Article 162 (2) (a) had been established, Article 165 (5) is called into operation, which is a constitutional limitation to the unlimited jurisdiction of the High Court in Article 165 (3) (a). As we speak, the unlimited jurisdiction of the High Court in matters relating to employment and labour relations is accordingly limited. Courts have said time and again that the unlimited jurisdiction of the High Court has been limited by the Constitution itself, particularly by Article 165 (5) of the Constitution and the phrase unlimited jurisdiction *"should not be misconstrued to include everything. The exercise of unlimited jurisdiction by the High Court is subject to the Constitution".*

Proper interpretation of s.22 of the Sixth Schedule

[10] A proper interpretation of section 22 of the Sixth Schedule of the Constitution, 2010, as a general rule, is that all judicial proceedings on employment and labour relations pending before any court will have to be heard and determined by the Industrial Court that was established by Parliament through the Industrial Court Act, 2011, which is the legislation enacted pursuant to Article 162 (2) and (3) of the

Constitution. The Industrial Court is the court envisaged under Article 162 (2) (a) of the Constitution. There is nothing in law, constitutional or statutory, which prevents the Industrial Court under the Industrial Court Act, 2011 from exercising jurisdiction on matters which occurred before its establishment. This interpretation does not violate the principle of retroactive application of the law as argued by the Plaintiff. For the worth of the argument on retroactive law, it is profitable to treat the subject of retroactive or retrospective laws in a deep manner for a better understanding of my position on the argument by the Plaintiff on the subject.

THE DOCTRINE OF RETROSPECTIVE/RETROACTIVE LAWS

[11] The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called *the bill of attainder* (1300-1600) on a person *(attainder)* who had been sentenced to death or declared an outlaw. Literally, all civil rights of the *attainder* were extinguished whether past, present and future, and could not perform any of the legal functions that he performed before the attainder. According to the Black's Law Dictionary, 7th Edition, retroactive/retrospective is:

A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden…Also termed retrospective law.

No right or obligation that has been abrogated

[12] My own view, is that, by creating the Industrial Court to hear and determine disputes on employment and labour relations does not in any way offend the rule against retroactive application of the law. On the contrary, it is a guarantee for a sure and an unhindered access to justice by litigants, and it does not matter whether their cases accrued before or after the establishment of the Industrial court. It is a new jurisdiction with the status of the High court and does not block or take away the right of litigants whose cases were filed before the establishment of the court to have their disputes determined by that court. *Accordingly, the legislative act herein is not unconstitutional as it is not 1) a bill of attainder, 2) an impairment of the obligation of contracts, 3) a divestiture of vested rights, or 4) constitutionally forbidden*. That kind of constitutional approach is permissible under the Constitution of Kenya, 2010, within the doctrine of retroactive laws. The Constitution is self-referential, and provides a solution to the question whether the Industrial Court created under the Constitution will have jurisdiction over judicial proceedings which were pending before other courts prior to its establishment. The Constitution in Section 22 of the Sixth Schedule, permits cases which were pending before any court *to be heard and determined by… a corresponding court established under this Constitution*. The phraseology *"a corresponding court"* should be understood in connection with the employment and labour relations disputes rather than *of similar jurisdiction* because the former industrial court did not have exclusive jurisdiction and was not of a status of the High Court. I take this view out of abundance of care to the constitutional provisions that Article 162(2)(a) reserves jurisdiction on disputes relating to employment and labour relations for the Industrial Court created under the Constitution. The provision of Section 22 of the Sixth Schedule is therefore backward looking and so it cannot be said that the Constitution forbids retroactive application of the law, and particularly on the jurisdiction of the Industrial Court to hear and determine cases pending before any court prior to its establishment. The only thing that courts should be careful not to escape their mind is adherence to the principles of retroactive laws as outlined herein above in dealing with cases that were pending before its establishment, in that, no right that had vested, or obligation or liability that had attached should be divested or absolved respectively except in accordance with the applicable law.

Jurisdiction is conferred by law

[13] Jurisdiction cannot be assumed by the court because a party thinks the court has jurisdiction, or for convenience of the parties or upon the consent of the parties. Even under conflict of law particularly in arbitration, the courts of the state whose laws shall govern any dispute arising in the agreement must be

competent to preside over the subject matter in accordance with their municipal laws. Jurisdiction is conferred by the law – Constitution or statutes. Furthermore, jurisdiction cannot be conferred on a court through the doctrine of retroactivity of laws. The doctrine only guides a court in deciding whether or not a particular statute offends the principle of legality–a safeguard; 1) of the rights which had already accrued; and 2) against absolution of liability that had already attached before the new law. This is not the case here, and I think, allowing the Industrial Court to hear and determine cases which accrued or were filed before its establishment is not in any way unconstitutional. The new law does not affect the rights of the Plaintiff because it has created a court with the status of the High court to hear his case.

Creation of Industrial Court part of State's obligations

[14] Indeed the framers of the Constitution created the Industrial Court distinct from the High Court as the legal way of emphasizing the due importance of employment and labour relations issues within the polity of socio-political and economic governance of the country. That court is expected to be efficient with simplified procedures which do not entangle the employment and labour relations issues to the extremities of legal technicalities. It is also in line with the State's international obligations to establish robust legal and institutional framework on employment and labour relations issues which give effect to the international labour standards set by the ILO, better protects the rights and obligations of employees and employers under the Constitution, international treaties, conventions and agreements which Kenya has ratified.

Need for consistence

[15] At the moment, courts are continually engaged in interpretation sessions in order to give effect to the objects, purposes and values of the Constitution. It is an exercise which should produce a robust jurisprudence imbued with consistence and a construct of judicial precedents in employment and labour relations issues. To me, it will not be desirable for the High Court and the Industrial Court to contemporaneously hear and determine disputes relating to employment and labour relations. That will not only betray the constitution desire to have a defined repository of jurisprudence on employment and labour relations, but will also increase a real possibility of diverse decisions emerging from both courts on issues that are similar. Needless to say, that, it is not a remote possibility that legal as well as judicial embarrassment may also ensue. The Constitution envisages constructive orderliness and consistence in the administration of justice, which, I believe, will be most achieved if all matters on employment and labour relations were heard and determined by the Industrial Court. The Constitution, in its elegant provisions in Article 162(2) (a) and 259 of the Constitution, and I do not think I am wrong, by providing that the Industrial Court shall have the status of, but distinct from the High court, intended that court to apply the law in a manner that promotes its purposes, values and principles, and permits development of the law on issues on employment and labour relations. These values are various and include access to justice, expeditious disposal of justice, simplified judicial processes, judicial precedent and so on.

Access to justice

[16]It bears repeating that, establishment of the Industrial Court does not take away the right to access to justice. It has enhanced unhindered accs to justice by integrating all disputes on employment and labour relations as it is the only court that is competent to hear those disputes whether they accrued before, at or after its establishment. As earlier said, a purposive interpretation of section 22 of the Sixth Schedule of the Constitution makes it possible for a suggestion that the Industrial Court, which has the status of the High Court, could be said to be the corresponding court established under the Constitution for purposes of proceedings on employment and labour relations which were pending before the High Court.

[17]I believe the view I have taken on this matter is one that gives effect to the objects, values and purposes of the Constitution in accordance with Article 259 of the Constitution. I entirely agree with *Justices Mary Kasango and F. Tuiyot* in their observations on Article 259 of the Constitution in **R v AG & 2 Others [2012] e KLR** that the people of Kenya never intended that there should be a lapse in the adjudication of cases when they enacted the Constitution of Kenya, 2010. Before the Industrial court was fully operational, there is support in the view that the High Court had jurisdiction on disputes on

employment and labour relations. This was enabled by the Constitution as well as the Industrial Court Act when they provided transitional mechanism for resolution of all disputes on employment and labour relations pending the establishment of a fully operational Industrial Court with presiding judges duly appointed. Once that was fastened, all matters which had not been finalized in the High Court or any other court should be heard and determined by the Industrial Court. This matter is not yet finalized, and truly speaking, hearing has not commenced, and there are no such circumstances that should impel the court to hear this matter. In the circumstances of this case, and the fact that the Industrial Court is fully operational, the principle of necessity will not even avail in the matter.

Industrial Court has jurisdiction

[18] In the premises, I find that, it will be a negation of the Constitution for the High Court to assume jurisdiction on this matter, especially now that the Industrial court has been established and is fully operational. I am not persuaded to agree with the argument by the Plaintiff that, since section 33 of the Industrial Court Act talks only of proceedings pending before the Industrial Court established under the Labour Institutions Act, the High court is conferred jurisdiction to hear this matter. That does not necessarily follow as jurisdiction is never conferred by default. It is granted by the law expressly or under delegated legislation, or by a practice which is permitted and adopted by the law, for instance, the power of the High Court and the Court of Appeal of Kenya to punish for contempt is adopted by the Judicature Act from the practice of the High Court of Justice in England. Neither the Constitution nor the Industrial Court Act deprives the Industrial Court the jurisdiction to hear judicial proceedings that were pending before the High Court. Further, the Chief Justice or the Registrar of the High Court has not directed otherwise. In sum, since jurisdiction on disputes relating to employment and labour relations has been conferred on the Industrial Court, no other court should seek to exercise jurisdiction on the pretext of the previous jurisdiction that it possessed over those disputes. Some legal basis, constitutional or statutory, must exist-it is *sine qua non* the exercise of jurisdiction by a court of law. I therefore find that the Industrial Court is the proper court with jurisdiction to hear and determine this case. I accordingly direct that this file be transmitted to the Industrial Court sitting in Bungoma County, or within the proximate geographical location of Bungoma county, or as by law provided. In the past, even before the promulgation of the Constitution of Kenya, 2010, where other competent courts had been established with exclusive jurisdiction to try certain matters, the practice by the High Court had been to transfer all such matters to those courts for hearing and disposal.

Dated, signed and delivered in open court at Bungoma this 11th day of April, 2013.

F. GIKONYO

JUDGE